

NOV 2002

STATE OF MICHIGAN
IN THE SUPREME COURT

TERM

Appeal from the Court of Appeals
Donald E. Holbrook, Jr., Presiding Judge

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff - Appellee,

Docket No. 120461
Court of Appeals No. 229111
Bay County CC No. 00-001112-FH
Bay County DC No. 99-4349-FY

v

MARK DREW PERKINS,

Defendant - Appellant.

BRIEF ON APPEAL - - PLAINTIFF-APPELLEE

(Oral Argument Requested)

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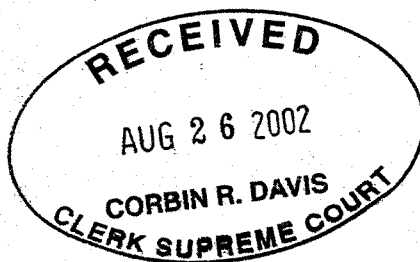


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ISSUE 1:

WAS THE COURT OF APPEALS IN ERROR IN FINDING THAT THE MAGISTRATE HAD ABUSED HIS DISCRETION IN FAILING TO BIND DEFENDANT OVER TO STAND TRIAL ON THE CHARGE OF 1ST DEGREE CRIMINAL SEXUAL CONDUCT WHERE THE TESTIMONY TAKEN AT PRELIMINARY EXAMINATION ESTABLISHED THAT AT THE AGE OF 12 THE VICTIM BECAME INVOLVED WITH DEFENDANT, A DEPUTY SHERIFF, AND DEFENDANT'S WIFE, A SCHOOL TEACHER AND BASKETBALL COACH; WHERE THE RELATIONSHIP STARTED AT SCHOOL, EVENTUALLY INVOLVED THE VICTIM ACTING AS A BABYSITTER IN DEFENDANT'S HOME; WHERE THE RELATIONSHIP FURTHER EVOLVED TO WHERE THE VICTIM CONSIDERED HERSELF A PART OF DEFENDANT'S FAMILY AND WAS SPENDING NIGHTS AT DEFENDANT'S HOME AT TIMES WHEN SHE WAS BABYSITTING AND AT TIMES WHEN SHE WAS NOT BABYSITTING; WHERE THE VICTIM, A CHILD WHO HAD BEEN ADOPTED AT AGE 4, AND THEN ABANDONED BY HER ADOPTIVE FATHER AT AGE 9, BEGAN TO LOOK AT DEFENDANT AS THE FATHER FIGURE SHE DID NOT HAVE; WHERE DEFENDANT SLOWLY BEGAN TO COMMIT SEXUAL CONTACT WITH THE 12 YEAR OLD VICTIM, AT FIRST BY PATTING HER ON THE REAR END AFTER A GOOD BASKETBALL GAME AND COMPLIMENTING HER PERFORMANCE AND THEN EVENTUALLY PROCEEDING FURTHER TO INCIDENTS INVOLVING SEXUAL PENETRATION, INCLUDING ACTS OF SEXUAL INTERCOURSE AND ACTS OF FELLATIO; WHERE THESE SEXUAL ENCOUNTERS EVENTUALLY OCCURRED AT LEAST A COUPLE OF TIME A WEEK, BEGINNING AT AGE 12 AND ENDING AT AGE 18; WHERE THESE ACTS OCCURRED IN DEFENDANT'S HOME, AT TIMES WHEN HIS WIFE AND CHILDREN WERE PRESENT IN THE HOME, AT DEFENDANT'S FAMILY COTTAGE, AGAIN WHEN HIS WIFE AND CHILDREN WERE PRESENT AT THE COTTAGE, IN DEFENDANT'S

PERSONAL VEHICLES, IN MARKED AND UNMARKED POLICE VEHICLES, AT A SHOOTING RANGE AND AT THE VICTIM'S BOARDING SCHOOL; WHERE THERE IS TESTIMONY FROM AN EXPERT WITNESS, A PSYCHOLOGIST, THAT UNDER THESE CIRCUMSTANCES THE ACTIVITIES WOULD AMOUNT TO A PROGRAMMING IN A WAY OF THINKING AND BEING, AND THAT IT WOULD BE THE CONSENSUS OF OPINION AMONG PSYCHOLOGISTS, NO MATTER WHAT THEIR APPROACH TO PSYCHOLOGY, THAT A YOUNG PERSON WOULD NO LONGER HAVE A FREE CHOICE IN DECIDING WHETHER OR NOT TO ENGAGE IN SEXUAL ACTS ; WHERE THE EXAMINING MAGISTRATE FOUND THE VICTIM'S TESTIMONY TO BE ENTIRELY CREDIBLE AND BELIEVABLE, BUT WAS FACTUALLY IN ERROR IN UTILIZING AS A RELEVANT FACTOR THAT THE INCIDENT CHARGED ON JULY 4, 1993, WAS THE LAST SEXUAL ENCOUNTER WITH DEFENDANT, THE EVIDENCE ESTABLISHING INSTEAD THAT THE SEXUAL RELATIONSHIP CONTINUED FOR ANOTHER 1 ½ YEARS; WHERE THE EXAMINING MAGISTRATE INCORRECTLY VIEWED THE FACT THAT DEFENDANT WAS A POLICE OFFICER FROM THE STANDPOINT OF THE IMPACT IT HAD ON THE DATE OF OFFENSE WHEN THE VICTIM WAS 16 YEARS OLD AS OPPOSED TO VIEWING THE FACT THAT DEFENDANT WAS A POLICE OFFICER AS ONE ASPECT OF THE CONTINUUM OF EVENTS OVER A 4 TO 5 YEAR PERIOD OF TIME DURING THE VICTIM'S FORMATIVE YEARS OF SEXUAL DEVELOPMENT THAT COMBINED THE FACT THAT DEFENDANT WAS A POLICE OFFICER, WITH THE FACT THAT HE WAS A FATHER FIGURE, WITH THE FACT THAT FOR ALL INTENTS AND PURPOSES DEFENDANT LED THE VICTIM TO BELIEVE THAT SHE WAS A PART OF HIS FAMILY, WITH THE FACT THAT DEFENDANT AND HIS WIFE AS POLICE OFFICER AND SCHOOL TEACHER HELD HIGHLY RESPECTED POSITIONS IN THE COMMUNITY, INCLUDING THE FACT THAT DEFENDANT WAS A "D.A.R.E.", OFFICER, COUPLED WITH THE FACT THAT DEFENDANT AND HIS WIFE REGULARLY ATTENDED CHURCH, PICKING THE VICTIM UP SO THAT SHE COULD ATTEND CHURCH WITH THEM EVERY SUNDAY, WERE ALL COMING TOGETHER TO SHOW THAT DEFENDANT IN EFFECT PROGRAMMED THE VICTIM TO NOT QUESTION THEIR SEXUAL ENCOUNTERS AND TO INSTEAD CONSIDER THEM TO BE A NORMAL PART OF WHAT THEY WERE TO DO WHEN THEY WERE TOGETHER, AND TO THUS TAKE AWAY HER FREE WILL AND SUBJUGATE HER INTO BECOMING A "SEX SLAVE"?

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STATEMENT OF BASIS OF JURISDICTION

Plaintiff-Appellee believes that Defendant-Appellant's "Statement of the basis of Jurisdiction of the Michigan Supreme Court" is complete and correct.

COUNTER-STATEMENT OF QUESTION INVOLVED

WAS THE COURT OF APPEALS IN ERROR IN FINDING THAT THE MAGISTRATE HAD ABUSED HIS DISCRETION IN FAILING TO BIND DEFENDANT OVER TO STAND TRIAL ON THE CHARGE OF 1ST DEGREE CRIMINAL SEXUAL CONDUCT WHERE THE TESTIMONY TAKEN AT PRELIMINARY EXAMINATION ESTABLISHED THAT AT THE AGE OF 12 THE VICTIM BECAME INVOLVED WITH DEFENDANT, A DEPUTY SHERIFF, AND DEFENDANT'S WIFE, A SCHOOL TEACHER AND BASKETBALL COACH; WHERE THE RELATIONSHIP STARTED AT SCHOOL, EVENTUALLY INVOLVED THE VICTIM ACTING AS A BABYSITTER IN DEFENDANT'S HOME; WHERE THE RELATIONSHIP FURTHER EVOLVED TO WHERE THE VICTIM CONSIDERED HERSELF A PART OF DEFENDANT'S FAMILY AND WAS SPENDING NIGHTS AT DEFENDANT'S HOME AT TIMES WHEN SHE WAS BABYSITTING AND AT TIMES WHEN SHE WAS NOT BABYSITTING; WHERE THE VICTIM, A CHILD WHO HAD BEEN ADOPTED AT AGE 4, AND THEN ABANDONED BY HER ADOPTIVE FATHER AT AGE 9, BEGAN TO LOOK AT DEFENDANT AS THE FATHER FIGURE SHE DID NOT HAVE; WHERE DEFENDANT SLOWLY BEGAN TO COMMIT SEXUAL CONTACT WITH THE 12 YEAR OLD VICTIM, AT FIRST BY PATTING HER ON THE REAR END AFTER A GOOD BASKETBALL GAME AND COMPLIMENTING HER PERFORMANCE AND THEN EVENTUALLY PROCEEDING FURTHER TO INCIDENTS INVOLVING SEXUAL PENETRATION, INCLUDING ACTS OF SEXUAL INTERCOURSE AND ACTS OF FELLATIO; WHERE THESE SEXUAL ENCOUNTERS EVENTUALLY OCCURRED AT LEAST A COUPLE OF TIME A WEEK, BEGINNING AT AGE 12 AND ENDING AT AGE 18; WHERE THESE ACTS OCCURRED IN DEFENDANT'S HOME, AT TIMES WHEN HIS WIFE AND CHILDREN WERE PRESENT IN THE HOME, AT DEFENDANT'S FAMILY COTTAGE, AGAIN WHEN HIS WIFE AND CHILDREN WERE PRESENT AT THE COTTAGE, IN DEFENDANT'S PERSONAL VEHICLES, IN MARKED AND UNMARKED POLICE VEHICLES, AT A SHOOTING RANGE AND AT THE VICTIM'S BOARDING SCHOOL; WHERE THERE IS TESTIMONY FROM AN EXPERT WITNESS, A PSYCHOLOGIST, THAT UNDER THESE CIRCUMSTANCES THE ACTIVITIES WOULD AMOUNT TO A PROGRAMMING IN A WAY OF THINKING AND BEING, AND THAT IT WOULD BE THE CONSENSUS OF OPINION AMONG PSYCHOLOGISTS, NO MATTER WHAT THEIR APPROACH TO PSYCHOLOGY, THAT A YOUNG PERSON WOULD NO LONGER HAVE A FREE CHOICE IN DECIDING WHETHER OR NOT TO ENGAGE IN SEXUAL ACTS ; WHERE THE EXAMINING MAGISTRATE FOUND THE VICTIM'S TESTIMONY TO BE ENTIRELY CREDIBLE AND BELIEVABLE, BUT WAS FACTUALLY IN ERROR IN UTILIZING AS A RELEVANT FACTOR THAT THE INCIDENT CHARGED ON JULY 4, 1993, WAS THE LAST SEXUAL ENCOUNTER WITH DEFENDANT, THE EVIDENCE ESTABLISHING INSTEAD THAT THE SEXUAL RELATIONSHIP CONTINUED FOR ANOTHER 1 ½ YEARS; WHERE THE EXAMINING MAGISTRATE INCORRECTLY VIEWED THE FACT THAT DEFENDANT WAS A POLICE OFFICER FROM THE STANDPOINT OF THE IMPACT IT HAD ON THE DATE OF OFFENSE WHEN THE VICTIM WAS 16 YEARS OLD AS OPPOSED TO VIEWING THE FACT THAT

DEFENDANT WAS A POLICE OFFICER AS ONE ASPECT OF THE CONTINUUM OF EVENTS OVER A 4 TO 5 YEAR PERIOD OF TIME DURING THE VICTIM'S FORMATIVE YEARS OF SEXUAL DEVELOPMENT THAT COMBINED THE FACT THAT DEFENDANT WAS A POLICE OFFICER, WITH THE FACT THAT HE WAS A FATHER FIGURE, WITH THE FACT THAT FOR ALL INTENTS AND PURPOSES DEFENDANT LED THE VICTIM TO BELIEVE THAT SHE WAS A PART OF HIS FAMILY, WITH THE FACT THAT DEFENDANT AND HIS WIFE AS POLICE OFFICER AND SCHOOL TEACHER HELD HIGHLY RESPECTED POSITIONS IN THE COMMUNITY, INCLUDING THE FACT THAT DEFENDANT WAS A "D.A.R.E.", OFFICER, COUPLED WITH THE FACT THAT DEFENDANT AND HIS WIFE REGULARLY ATTENDED CHURCH, PICKING THE VICTIM UP SO THAT SHE COULD ATTEND CHURCH WITH THEM EVERY SUNDAY, WERE ALL COMING TOGETHER TO SHOW THAT DEFENDANT IN EFFECT PROGRAMMED THE VICTIM TO NOT QUESTION THEIR SEXUAL ENCOUNTERS AND TO INSTEAD CONSIDER THEM TO BE A NORMAL PART OF WHAT THEY WERE TO DO WHEN THEY WERE TOGETHER, AND TO THUS TAKE AWAY HER FREE WILL AND SUBJUGATE HER INTO BECOMING A "SEX SLAVE"?

The Circuit Court answered: NO.

The Court of Appeals answered: YES.

Plaintiff-Appellee answers: YES.

Defendant-Appellant answers: NO.

COUNTER-STATEMENT OF FACTS

Defendant-appellant was charged with the offenses of criminal sexual conduct 1st degree (MCL 750.520b), felony firearm relating to the CSC 1st charge (MCL 750.227b), misconduct in office (MCL 750.505), and felony firearm relating to the misconduct in office charge (MCL 750.227b), all occurring on July 4, 1993. A preliminary examination was begun on September 15, 1999, during which testimony was taken from the victim, Nicole Fisher. The preliminary Examination continued on October 8, 1999, during which testimony was taken from Rosemary Jalovaara, a psychologist. Following the completion of the testimony, the Court requested that the parties file written summations following the receipt of transcripts of the testimony.

On March 16, 2000, the District Court rendered its decision to dismiss Count 1, the CSC 1st charge, and Count 2, the felony firearm charge relating to the CSC 1st charge. (198a).

As for Counts 3 and 4, misconduct in office and an associated charge of felony firearm, the Court found probable cause to bind the defendant over on those counts. (200a).

It is from the refusal to bind defendant-appellant over on the CSC 1st charge and the related felony firearm charge that the People filed their "motion to amend Information" in Circuit Court pursuant to MCR 6.112 (G) and People v Goecke, 457 Mich 442; 579 NW2d 868 (1998).

In addition, defendant-appellant filed in Circuit Court a "motion to quash

Information” relating to the misconduct in office and associated felony firearm charges.

The Circuit Judge denied the “motion to amend” and granted the “motion to quash”. (201a - 209a).

The People filed a timely appeal in the Court of Appeals seeking reinstatement of all charges. The Court of Appeals issued its decision affirming in part and reversing in part. (211a - 215a). The Court of Appeals also denied motions by the parties for a rehearing. (216a).

The People filed an application for leave to appeal to the Michigan Supreme Court relating to the Court of Appeals decision affirming the Circuit Court’s quashing of the Information relating to the misconduct in office and associated felony firearms charge, as well as the ruling that the felony firearms charge that had been associated CSC charge had been abandoned. Defendant filled an application for leave to appeal to the Michigan Supreme Court relating to the Court of Appeals decision to reinstate the CSC 1st charge.

The Michigan Supreme Court granted both applications for leave to appeal. (217a).

This brief deals with defendant-appellant’s appeal in Docket # 120461 relating to the CSC 1st charge.

The People have previously filed their brief as plaintiff-appellant in Docket # 120453 relating to the abandonment of the felony firearm charge associated with the CSC charge, the misconduct in office charge and the related felony firearm charge.

It has been the plaintiff-appellee’s theory from the beginning, that defendant-appellant engaged in a course of conduct with the victim, Nicole Fisher (then Nicole

Jacobs), beginning when she was 12 years old, that placed her in a state of subjugation so that by the time this offense occurred when she was 16 - almost 17 years old - she did not have the emotional and psychological ability to not engage in sexual conduct with defendant-appellant, and that this state of subjugation amounted to coercion under the CSC statute.

Nicole testified as follows:

That she first met defendant Mark Perkins when his wife, Darby, was her sixth grade basketball coach. Nicole was 12 years old, born on 7/12/1976. That Mark Perkins would come to practices, and that sometimes he would help at the practices or help transport the kids. He would sometimes help out with the coaching by helping with the drills. (9a - 10a; 31a - 32a). He would also come to the games. (32a).

That they had figured out that they lived in the same neighborhood, and that toward the end of the basketball season, Mrs. Perkins asked her if she would be interested in baby sitting for their children. "And they were terrific people to me. They kind of took me under their wing. I kind of had a hard life growing up and they were there for me." (10a).

The Perkins had two children when Nicole started baby sitting for them. Drew was nine and a half months old to ten months old, and Andrea was about two. (10a).

Nicole would spend various amounts of time at the Perkins household. Sometimes she would spend the night. As the relationship progressed, there would be times when she would spend time at the Perkins house when she was not baby sitting. Nicole grew very comfortable with the Perkins family, and considered herself a part of their family. (11a - 12a).

In this same regard, Nicole later was asked about how she happened to switch from Bangor Junior High School to St. Johns Lutheran school. She responded:

“A As I've said countless times Mark and Darby were like a family to me. And I attended church with them regularly. They picked me up for church every Sunday. And I believe that by through going to church with them the Holy Spirit worked faith in my heart. And with that faith I really wanted to go to a Christian school. And I begged my mother to let me go. And she let me go. And I would say--and Mark and Darby obviously were encouraging of that and very happy because they themselves were members of that church.

Q I see. So they--both of them encouraged you to go to that school and you were able--

A They were happy that I was going there.

Q Okay. So that's how you happened to go there?

A Yes.” (52a - 53a).

Nicole trusted Mark Perkins. “. . . I trusted him and I guess I looked up to him as a father figure, as the father I never had my - - in my life.” (13a).

Nicole knew that Mark Perkins was a police officer. When asked how she felt about that, the reply was “I felt fine. I felt safe.” (13a).

Nicole indicated that when she was 12 years old or sometime in that area Mark Perkins began to do things to her that he shouldn't have done. “It just general patting on the rear end after a good game, you know, you did really well, Nicole. And then it proceeded further.” (19a).

“My next recollection was when the first time he had sexual intercourse with me. There were lots of rubbings of the behind in between and just comments and innuendo toward me and at me.” (20a). Nicole was 12 years old when this occurred, and it took

place in the defendant's bedroom. (20a).

When asked how she felt about what took place, Nicole stated "the best word to describe how I felt was ambivalent. I was 12 years old, my hormones were raging. And then there's the other side of me that knew that this was completely wrong. But I liked it." (21a).

Nicole testified that the first act of sexual intercourse was not the last. "Over the period of time that we had a sexual relationship I can say with confidence that it happened at least a couple times a week. It was something that was expected. . . . It's whenever he saw me and we were alone that would be what we do." (22a).

Nicole testified that she was adopted when she was four years old. Her mother and adoptive father divorced when she was nine years old, and she never really had a relationship with her father. (22a - 23a).

Nicole was asked if she had a memory of whether her feeling back when this was going on was that this was the type of thing that happened in a normal father/daughter type relationship, family relationship. (23a). The response was "I guess I didn't know. I was confused. So, of course, my gut instinct was that this was wrong." (30a).

Nicole indicated that acts of sex took place in the defendant's home, in his vehicles, in police vehicles, in Nicole's mother's home, in a study hall room at Michigan Lutheran Seminary, at the Perkins family cabin, and at the shooting range. (32a - 33a).

Regarding the shooting range, Nicole testified that the defendant was a police officer and would go to the shooting range to shoot guns as a hobby type thing. Nicole felt that they also went as a bonding experience. (33a - 34a). Generally the defendant

and Nicole would go to the shooting range by themselves, but sometimes Darby Perkins and the children would come along. (34a). She testified that they would have sex in the defendant's van. She also testified that they had sex on a sand pile that would catch the bullets. (34a - 35a).

Regarding the Perkins family cabin, Nicole testified that she first went to the cabin when she was probably 13. She and the defendant never went alone. There were always other family members present. Sexual encounters would occur outdoors at night. (37a - 38a).

Regarding the Perkins family home, Nicole testified that there were countless occasions when sex occurred in the family home, beginning when she was 12 years old and ending when she was probably 17 years old. During the sexual encounters at the family home, other family members would often be present at the home. "Sometimes the kids would be outside playing. Other times they would be napping. Sometimes Darby and the kids were in bed at night. It happened late at night." (39a - 40a). If Mrs. Perkins was home in bed, and the children were in bed, the sex would occur in the living room or in the peach room. "The peach room was the room that I often slept in when I stayed there." (40a).

Regarding vehicles, Nicole testified that there were "three vehicles where the intercourse took place. One vehicle was a Chevy Suburban, another Chevy Blazer, and finally a Ford van." (41a). Sex occurred on the way home from baby sitting. (41a). When Nicole attended Michigan Lutheran seminary, she played basketball. The defendant would often come to watch her games, and sex would occur when he drove her back from the games. This started when Nicole was a freshman about age 14 and

continued until she graduated at age 17. (42a - 43a). Also during this time period, the defendant and Nicole took statistics for the football team and turned the statistics into the coaches at the end of the night. The defendant would often take her home from the games, and sex would occur on every occasion. (44a).

“Please understand that sex was just something that was automatic. It’s like when we were together and we were alone it was something that happened.” (44a).

Regarding Nicole’s mom’s home, sex would occur downstairs in the living room. “We would have sex in the living room because Mr. Perkins did not want to take me upstairs for fear that somebody could come home and it would be easy to be caught. And we’d have sex in the living room because there were sheer curtains in there and you could see and you could hear if someone was approaching, coming home.” (45a).

There were also sexual encounters with the defendant in Bay County Sheriff’s Department vehicles on more than one occasion. Sex occurred in marked police vehicles, and in unmarked police vehicles. It occurred on the way to school as well as at other times. (46a - 51a).

Regarding the study hall room at Michigan Lutheran Seminary, it occurred one evening when Nicole was quite upset. She had telephoned the defendant, and he knew she was upset. He came to the school that night to see her. Nicole had intended to break it off with him that night. When the defendant arrived, he had Nicole paged in her dormitory. When she came down, he asked if there was a place where they can talk privately. The Dean of Women let them go into a study hall room. The defendant began apologizing to Nicole, and trying to hold her. “And then he propped me up on a study hall desk and things happen from there.” (51a - 52a).

Regarding the July 4, 1993, charges: this was the summer before Nicole's senior year in high school. She had gone on a month long student study program to Mexico sponsored by Michigan Lutheran Seminary. While she was in Mexico, the defendant telephoned her twice. During the second telephone call the defendant told her he had something very special for her, and that she should look underneath the bench on her mother's front porch as soon as she got home. (54a - 55a).

When Nicole looked under the bench on her mother's front porch, she found a promise ring. She talked to defendant Perkins on the telephone even though he was on duty, "and we agreed to meet at the Industrial Park on my way into church that Sunday. And we met there." (55a). Nicole was 16 years old at the time, and she was able to drive herself to the Industrial Park. The defendant was driving a marked patrol car. (55a - 56a).

"We met at the very end of the alcove. . . . There was a dead end sign down there. . . . I got out of my car and I got into the patrol car. And Mr. Perkins and I talked and I - - . . . I performed oral sex on him." (56a).

Nicole was asked:

"Q Why--how is it that you happened to perform oral sex on him?

A As I've stated before sex was just something that was expected. It was--

Q Did he indicate to you that he wanted you to perform sex on him that day?

A He didn't need to.

Q Okay. So does that mean he did not indicate to you that he wanted you to perform sex that day or you just did it because it was expected or--or did he make some indication

that he wanted sex that day?

A I don't remember him making any indication. He could have.

Q How was he dressed?

A In full uniform.

Q Full Sheriff's Department uniform?

A Yes.

Q Did he have a gun with him?

A Yes, he did.

Q Did he do anything to try to prevent you from performing oral sex on him that day?

A No.

Q In order to perform oral sex on him that day did he pull his trousers down?

A He unbuckled his stuff, he did not pull them down. He just opened them." (56a - 57a).

Nicole Fisher was then question regarding how this whole series of events had affected her emotionally. She stated: "This has affected my whole being. . . . It's affected me emotionally tremendously. . . . It has stunted the person I could have become. I was robbed of my childhood innocence. I was not able to function as a normal healthy - - . . . individual." (57a - 58a). . . . "Sexual abuse, it permeates your whole being. It affects my relationships. It affects how I deal with things. It makes me a very insecure person. It makes me feel full of shame and full of guilt. It makes me feel worthless, used, and disgusting." (60a).

Nicole testified that she has undergone psychological counseling as a result of

this series of events. The counseling began in October of 1996 and continues to the present time.

"There were times when I couldn't function. . . . I couldn't walk around and I was hypersensitive to everything. I couldn't let my husband leave the house without thinking he was doing something. Because Mr. Perkins did the same thing to his wife, why wouldn't my husband do it to me. It affects my relationships with people. My neediness. Or my fear to let somebody inside. It affected me emotionally in school. But, yes, I could have been a much better student I feel. I couldn't concentrate on my athleticism." (60a - 61a).

Nicole testified that she had dreams or nightmares about what occurred, and that she's had countless sleepless nights. She takes medication so that she can sleep at night. It has affected her ability to eat. (62a).

During cross-examination, defense counsel James Hammond attempted to elicit testimony from Nicole that she was not forced or coerced into her relationship with the defendant. Nicole maintained: "**He did not physically force me to do it but he had manipulated my mind-** . . . which I was vulnerable to it and at the same time I did not want to say no to him." (Emphasis added). (68a).

Defense counsel persisted:

"Q But he didn't coerce you in any manner, shape, or form though, did he?

A Yes, he did.

Q Well, are we getting into a debate about terms here? Did he--would it be fair to say maybe he seduced you?

A Yes, that would be fair to say.

Q He led you astray. But I mean, he didn't coerce you or force you to do it?

A He did not force me to do it, no.

Q All right. He didn't brow beat you into doing it?

A No.

Q He didn't use any perceived power that he had over you?

A Yes, he did. I feared--you have to understand I loved this person like a father figure and I was scared to say no to him.

Q Well, what were you afraid of?

A I was afraid that if I said no then he would be angry with me.

Q But this was all in your mind?

A This was all in my mind, yes.

Q This was nothing as a result of anything he said or did?

A No.

Q You did it essentially to please him you're stating, is that correct?

A Yes.

Q Because of a feeling that you had that you wanted to please him?

A Yes.

Q And you had ambivalent feelings about it, one of which was that you enjoyed it?

A Yes. We're all sexual creatures. We can all be stimulated." (69a).

Counsel then asked a series of questions designed to establish that the defendant that was not in a recognized position of authority over Nicole. Eventually, he asked:

"Q Okay. He was never in a recognizable position of authority over you, correct?

A Correct, other than his office as police officer.

Q Well, do you feel that somehow that because he was a police officer he was in a position of authority over you? Had he ever arrested you?

A No, but I feel that any--

Q Had he ever taken--had he ever taken you--

MR. DRESSER: Excuse me--

BY MR. HAMMOND:

Q --into custody?

A I feel that--

MR. DRESSER: Excuse me. I'm--

THE WITNESS: --any police officer--

THE COURT: Just a minute.

THE WITNESS: --has authority over anybody.

THE COURT: Just a minute please. One at a time, folks.

MR. HAMMOND: Thank you, your Honor.

THE COURT: Everything's being taped and if we have more than one person talking it makes it very difficult to transcribe.

MR. DRESSER: Excuse me, I---

THE COURT: Your objection, Mr. Dresser?

MR. DRESSER: Yes, your Honor. Counsel's not allowing the witness to finish her answers. I think she finally did get the answer out, but he's not allowing her to finish her

answers.

THE WITNESS: I feel that a police officer has authority over you, myself, and anyone sitting in this room. And I felt that he had authority over me in the sense that I trusted this man, I put him on a pedestal of my father. And a father has authority over his children. And that's the way I thought of him, whether that be rational, normal thinking that's not for me to decide. But that's how I felt. And, yes, he did have authority over me." (70a - 72a).

Defense counsel cross examined Nicole regarding the July 4, 1993 patrol car incident. As part of the questioning regarding conversations that took place, the following exchange occurred:

"Q Do you know if you told him about the details of your trip to Mexico?

A We talked about Mexico and we also talked about the ring that he had placed under the bench.

Q What, if anything, did you say about that?

A I told him it was beautiful and what he meant--asked him what he meant by it. And he told me he wanted to marry me.

Q All right. What happened after that?

A I believe I performed oral sex on him." (86a).

After some further cross-examination regarding what Ms. Fisher may have told a State Police or Sheriff Department investigators, Mr. Hammond asked:

Q And then at some point he asked you to perform oral sex on you--on him?

A It wasn't a question that was asked, it was just something that was expected.

Q How did it come about? Explain how it came about? I don't understand that.

A It just is expected. It's like when we're together that's what happens.

Q All right. When you were together, that was something the two of you would just do?

A Yes.

Q Without him having to say anything to you about it?

A Correct.

Q Something that you voluntarily, willingly would do with him when you were together?

A Yes.

Q Certainly by that time?

A Yes.

Q You don't dispute that certainly by that time you were a person who knew what she wanted to do, correct?

A Correct.

Q Had a will and recognized that you had a free will?

A Yes.

Q And decided to do the things that you did?

A Yes.

Q And could have decided not to do the things that you did had you wanted to, correct?

A Correct.

Q Okay. So the point is, is that performing this act of oral sex is something that you did voluntarily?

A Yes, it was.

Q He didn't hit you to make you do it?

A No, never.

Q He--all right. He never used any physical force?

A No.

Q And when you say he didn't hit you or use phys--it was not at that time or any other time, correct?

A Correct.

Q Likewise he didn't threaten to use physical force against you or any other person at this or any other time?

A No.

Q And you didn't believe when you were with him that day or on any other day that he would hurt you if you refused to engage in a sex act with him?

A No.

Q And he never threatened to do something to you or anybody else in the future if you refused to engage in a sex act with him on that day or any other day, correct?

A Correct.

Q And you didn't believe that he would hurt you and you didn't feel in any way uncomfortable with him at that time or any other time whether you engaged in a sex act with him or refused to, correct?

A Correct.

Q On that particular date, Mrs. Fisher, did you believe that you were in love with him?

A Yes, I did.

Q And did you think he loved you?

A Yes, I did.

Q And did you want to please him?

A Yes, I did.

Q And was it for that reason?

A Yes. (87a - 89a).

Counsel asked a series of questions that established that sexual relations continued after the July 4, 1993 incident. It was also established that in all of their sexual encounters, there was only one incident where Nicole did not want to have sex with the defendant.

Counsel asked:

“Q Okay. And is it a fair statement to say that you never had sex with him out of fear of him in any manner, shape, or form, correct?

A Fear of him abandoning me if I didn't.

Q All right. But not in fear of him doing something to hurt you?

A No.

Q Not because he had somehow coerced you?

A I guess I don't understand what you mean by coercion. Because--

Q Force, making you do it, he never did that?

A No.” (91a - 92a).

Defense counsel questioned Nicole regarding how the relationship ended. She indicated that it ended when she was 18 years old, after her current husband had asked her out on dates on several occasions, and she realized that her relationship with the defendant was going nowhere. (95a - 96a).

“Q So you decided to end the relationship?

A Yes.

Q I mean, it wasn't you finally felt you had a way out of it, you knew in truth you could've ended the relationship any time you wanted to, correct?

A **Sir, you don't understand, I did not have the strength to end the relationship at any time. I was abused by that man for many years. I could not physically or emotionally end that relationship.”** (Emphasis added). (96a).

On redirect examination, Nicole was asked the following:

Q Mrs. Fisher, when you were at--when you were 12 years old and were at Mr. Perkins house as a babysitter and doing the other things that you did there, did you feel at that point that he had authority over you and you had to do as he told you to do?

A Yes, I did.

MR. HAMMOND: Your Honor, can I have my continuing objection to this line of questioning?

THE COURT: Continuing objection's noted and certainly is preserved for the record, Mr. Hammond. Thank you.

MR. HAMMOND: Thank you, your Honor.

BY MR. DRESSER:

Q And did that feeling continue as you got older, that when you were at his house and with him that he as a--that you as a child needed to do as he told you to do?

A Yes.

Q You indicated and Judge Newcombe has also asked you about it, that at a point when you were in your junior year at Michigan Lutheran Seminary, prior to the July 4th--specific July 4th incident, that we have charged, July 4th, 1993, that

you called the defendant and indicated something about wanting to end the relationship, is that right?

A That's correct.

Q Okay. And you said in response to one of Mr. Hammond's questions that you didn't--at that point you didn't feel he was in a position of authority over you but you felt like that he had complete control over your mind?

A Yes, I did.

Q Can you explain that?

A I felt like everything was understood, that he wanted sex from me. I felt like if I even showed an ounce of what I really wanted or felt then--I guess the easiest way to explain it is I felt like if I said no that Mr. Perkins would abandon me.

Q And why were you concerned with him abandoning you?

A Because he was the only male role model I had in my life and I cared about him and I didn't want him to leave.

Q Now you say you didn't want him to leave yet you called him and said you wanted to end the relationship?

A Yes.

Q And he then came right over to Michigan Lutheran Seminary?

A Yes, he did.

Q What did he do to get you to continue the relationship?

A He--he used his manipulative talking with me, told me that he loved me, told me that he was sorry and everything was going to be okay and we could work it out.

Q He talked about marrying you?

A Yes.

Q When did that talk of marriage begin?

A As far back as I can remember. He often told me the only reason he married his wife is because he got her pregnant out of wedlock and he was kind of forced into that. And that I was the person he dreamed of marrying.

Q And did you believe him?

A Certainly." (114a - 116a).

On October 8, 1999, the Preliminary Examination continued.

A stipulation was placed on the record that on Sunday, July the 4th, 1993, the defendant was on duty with the Bay County Sheriff's Department and worked the shift that lasted from approximately 6:00 a.m. until 2:00 p.m. that day. (120a). Additionally, expert testimony was taken from psychologist, Rosemary Jalovaara.

Ms. Jalovaara was asked to explain what normal psycho-sexual development would take place at ages 12 to 13, and she responded as follows:

"Yes. In the development of children, right before this stage sort of, kind of leading up to it, it's a latency period. And that's children between the ages of around eight, seven or eight to about 11, 12, depending upon the rate of development of the child both physiological and emotional. From that latency stage is the beginning of the body changes, where the child may begin to experience body--actual physical changes in the body and the emotional changes that go along with this such as emerging sexual feelings. And it's during that time that the child many times is very shy about their bodies, confide in very trusted few people, usually people who are available, parental figures or guardians. And it's at a time where they are very fragile because they have the task actually of integrating during this period of time, this is the beginning of the integration of the physical body as it changes and grows and develops. And it's at an accelerated rate. At no other time does our body change that much other than in the first year of life. So the accelerated physical changes that are occurring as well as the hormonal, the androgen kinds of changes that are occurring which will give rise to sexual feelings and putting together with that a cognitive balance and a moral interweave, if you will, so that the child then is saying, who am I living in this body that's changing, and how do I relate to other people, how do they see me. And it's

at that time where peer pressure, where as the child develops and becomes 13, 14, 15 years old, the real sense of self about one's self as emerging as an adult will occur. And so that by the age of around 18, 19 there's more of a defined self of sense--a sense of self. And there is by usually around 21 an adult who has some attitudes, beliefs, whatever they hold dear, cherish and have goals that they have--begin to attain or have attained. So it's the whole process in which the physical self, sexual self, and the cognitive self, thinking, feeling, believing, and developing control of our impulses and a moral interweave that we will have a conscience and behave in a certain way. And this generally is the frame that most of us would agree upon is like a psycho-sexual development approach to becoming an adult." (130a - 132a).

Ms. Jalovaara was asked:

"Q Okay. What happens when, and we're talking--I'm talking about a female in this instance, what happens when the young girl does not have a father figure in her life, has a mother who is there but perhaps is not necessarily all that involved and that child then finds another family with professional--professional man, a professional woman who she spends a great deal of time with and to some extent become family figures, how do they interplay in this psycho-sexual development?

A Well, depending upon the degree of the bonding with the family and the needs of the child. Certainly without having a father figure a child of that age may idolize, look upon an older male, someone who could be available to her to help her meet many of the abandonment fears and rejection fears that children sometimes encounter when there's a parent absent from their life. We know that's one of the most profound difficulties for children to overcome in the development of self-esteem, because children literally learn to see themselves through the eyes of their parents starting knee-high and even before that as to the value of--their own value, their own self-value through the eye of a parent. So if that figure is absent from their life and there hasn't been anyone else to fill that, certainly meeting someone at a very vulnerable time where this person will present as a role model, how to behave as a father, how to treat a daughter. And if it's a family situation maybe even for this young person to rely on them for moral guidance or the things that their own family may not be available for them to do.

....

BY MR. DRESSER:

Q If the male/father figure in this then relationship between the girl and the family that she is sort of attached to begins to have sexual relations with that child beginning at about age 12 and then continuing on perhaps as often as several times a week. How does that factor into the psycho-sexual development and what the child sees as normal and acceptable?

A Depending upon the guidance that this young person has available, someone that they--a trusted adult they can talk with about this, generally children that young, the adolescent, pre-adolescent child would be certainly fearful, anxious, and also very curious. And with respect having developed in bonding for a surrogate family such a young person not having world experiences and certainly lacking people that she can go to for world experiences and guidance would be very vulnerable to the influences of the family, the surrogate family.

Q If the--if the sexual relationship were to develop between this person and the young girl and continue on for a period of years on a weekly basis, several time a week basis, perhaps at times only several times a month, but where every time they get together sex is part of that relationship and is expected as part of that relationship, how would you expect the child to view the sex?

A Well, in that it's a very vulnerable time for a young girl, an adolescent, the 13, 14, 15. The--what's occurring at that time are intense infatuations. And intense infatuations like people call puppy love are experienced by adolescents at that age as something that is almost euphoric and they're usually intense. And in cases where they're involved with other young people the same age, those things kind of ebb and flow and they change a great deal. When younger females, younger males are involved with older adults whom they respect and the psycho-sexual development is interrupted to the degree that they view adults as being wise, rely on them for guidance and assume or even allow the adult to make decisions for them because it's part of the expectation of young adults. Even when you go to school

the students rely on their teachers, they trust their teachers, have learned to trust other community figures, and certainly hopefully bonded with their parents or a surrogate family and trust them. And so with the lack of experience, the development of the hormonal influence, their naive approach to the world due to just lack of experience, lack of years of being in--on this planet, they frequently are overwhelmed and they're not able at that point to sort out for themselves what is okay and what's not okay. Particularly if they're being--if they're being supported, encouraged, led by very trusted adult figures - surrogate family, their own parents, etcetera.

Q And if the surrogate family happens to be composed of a mother who's a teacher and a father who's a police officer, would that enter into it as well?

A It certainly might be in the eyes of a developing child, a family that has community status, stature, certainly someone--a teacher, it's a trusted teacher, someone who they rely on, they respect, they trust their judgment. I think that would certainly be a factor.

Q Okay. If the male figure as the child gets older as to the age of perhaps 14 or 15, 16 promises or suggests that marriage may be in the offing and gives the girl gifts, how would that enter into it?

A Generally for the developing adolescent those--all those concepts are things that they're attempting to come to grips with. What are commitments in relationships, in love relationships, how do these feel inside the body, cognitively how do you weigh them, what do they mean. And trying to work that through takes a great deal of time and generally the normal psycho-sexual development is that people between those age ranges that we're discussing, the 13, 15 are experimenting with many other relationships, peer relationships where there isn't a great deal of stability in those relationships. And so they try a relationship out for a period of time and then try out another relationship. And there isn't really stability in that. That--the idea of commitment and stability is something that most individuals hopefully can cope with by the time they're in their late teens, early 20s. And when you look at commitment with marriage and the failure of about 45 to 50 percent of our

marriages I suppose even adults have problems with that. But certainly that idea of I can provide stability and a sense of family and have such value for you that I will never leave you, it might be very enticing to an adolescent who does not have a very secure family--biological family.

- Q When you have this relationship that develops between a young girl age approximately 12 years old with this family and with this male figure who happens to be a police officer in particular and it goes on for a period of years, she's 12, when she's 13, when she's 14 and 15, when she's 16, and part of that relationship involves the two of them having sex together, is a person at age 15, age 16 perhaps even older when they see this sex as just a very normal thing and not something to be asked do you want to do it or not, it just is something that is part of the relationship, is that person necessarily operating under their free will at that point?

....

- A The idea of free will for a child, it's a developing process. And it is part of that sense of self or who am I is all wrapped up in that. That the adolescent is experiencing hopefully some ability to detach from their family, to make choices, to come back to their family and to say is this a good choice. And the older the individual progresses into adolescence, the 17, 18 or whatever, the idea for most of us is that we work our way out of a job and so that our adult children or our older adolescent children are able to make good choices. But what has happened is that we've given them a framework of what the family values are, what we hold near and dear, what they need to separate for themselves and to say is theirs. And to go back and forth with the support from the family in molding a sense of self that is congruent with the outside society as well as within the family as well as within themselves. And that's a heavy duty process even in the regular family where you have two supportive parents and open communication. In a family where--a surrogate family or a family where a child would have assumed that the family will be there, will guide and direct and is placed in a position at a very vulnerable age of 11, 12 years old, they in essence have a cognitive set where this is the way this family behaves. And if you have someone like a police officer who enforces the rules of society, you have a teacher who is looked upon by students who say this person is

someone to guide and direct me and a person I can look up to or I like at least enough to be around or to become part of the family, I like being there, then this person in essence is being guided and directed by a surrogate family. And being able to come back to the surrogate family and bounce off the ideas of, is this appropriate behavior, what does this feel like when a sexual relationship is occurring and this is the direction of the family. And it doesn't seem that there's any place for this person to go with that. And the concept of sexual abuse actually is that there's an imbalance of power, that someone in the relationship has a great deal of the power, much more of the power than another person. And generally even between children, and look upon five years as being a criteria to say this is sexual abuse, this person really is not in a very powerful position here to have control in this relationship. So the developing sense of self, the developing cognition of this person, getting information from the community, sorting it out, getting support, making sense of it, and dealing with the sexual part of this which for, you know, the almost euphoric kind of wonderful feeling teenagers report when they're in love and nothing can get in the way of this infatuation. It's a combination where there really isn't very many places for this young person to go to make better choices. Okay. So the idea of free will is I see it as the support for better choices so that the individual isn't coerced in some way or led in some way so that they're able to do what's congruent from the sense of community, the sense of self, and the sense of family." (132a - 141a).

There was then a discussion of what the courts term subjugation vs. brain washing. Ms. Jalovaara testified:

". . . And with the whole psycho-sexual development we have a situation where there's also an amount of pleasure in this. And when I work with adolescents who have been sexually abused frequently there's a lot of shame and guilt and they'll say, well, you know, I did it, you know, I even liked it. And what they're really saying then is they're trying to put together their normal biological feelings of sex being a pleasurable activity and a sense of, is this okay, is this right. **Now that's where the parental morality, if you will, how you bring children up, have them look at sexual behavior comes into play. And certainly a child who is being sexually abused by someone that they trust, rely upon, believe in, their choices are limited because the whole integration of**

self now is based on this child's belief in family, that I'm being guided appropriately, the feeling that this feels good, and the adolescent psycho-sexual self that says there's some commitment here, some bond, something beyond if this person has promised them more. And they cannot sort that out. They just do not have the life experiences to sort it out. Life experiences with relationships, they don't know."
(Emphasis added). (143a - 144a).

Ms. Jalovaara also testified:

"Well, coercion or being led or manipulated or brainwashed are continuums of a--of way of being, of control. When we're considering the developed--the extraordinary development that's going on physically, emotionally, intellectually with an adolescent, the coercion occurs when the boundaries or the input from the family is something that the child assumes is okay because this is what my family does. And so it's almost an incestual kind of relationship. And if you consider that there are subconscious elements to all of our behavior, certainly not having the Oedipal Complex resolved, it's a subconscious force within this person where is it something that this person is able to say I want to do or I don't want to do. We all need to do that. It's part of our psycho-sexual development from the time we're three or four years old. The critical thinking, the cognitive part of this that a person at the age of 12, 13, 14, 15 has developed now a reliance on someone they see in many, many facets. They see no doubt this person as surrogate parent, a lover, a friend, someone who is respected--this particular person in the community as a police officer. There's such a dichotomy of roles here that it's--when you take a look at what the cognitive development is of that adolescent period, it would be really hard to sort all that out. So I'm--without having any place to go, another place where this person will confide, get help, a counselor, someone to help them sort all this out, it's almost an impossible task. And so I would believe that the adolescent female at this age who has been in this situation for any length of time might find this as a way of life, might find this as a way of being with a surrogate parent, and certainly with the unresolved oedipal when--see, the oedipal for a female is that you're attracted to your own father and want to get mother out of the way. And we all see that many times with our young children. When they're sitting with us on a sofa and the little girl comes and gets between mom and dad and kind of eases mom out. Okay. And what it really is, is that I love this parent so much, I'm so attracted to them and it's a different kind of sense of sexuality, feeling, it's amorphous sexuality

because it's so young at that age. As the child gets older and they're in adolescence they are actually dealing with intense sexual feelings. And need help in order to sort through what does this mean cognitively if I act on this, what does it mean to me in my emerging sense of self as I find out about myself. It's a biological driven concept for all of us that we're going to experience some type of sexual activity. And how--how will all of this be put together in a way so that it's interwoven that I end up with a sense of self where I can make my own decisions about myself. And in the best of all possible worlds when you have a great deal of help from other people and people who are there for you in a good way and help you make good decisions, working through these kinds of things, you know, it can be done. It's--children act out sexually in the teens and whatever, but, you know, many times parents can help them with those kinds of things and protect them and help them weigh what their values are and work those things through without a sense of coercion about it. So I see this more as a situation where the power involved here, the control involved here, the exuberance of the adolescents in their developing sexual feelings, the actual flattery of this attraction and being reciprocated, where this would be a very difficult thing for a young person to be able to say, well, now I make up my mind today that somehow I have the power to say no to you. And why? This is the way of life." (146a - 149a).

Finally, in an effort to place it into language more understandable to a layman, the following exchange occurred:

"Q When I indicated that as a layperson I looked at it as sort of brainwashing and you talked about brainwashing in the satanic sexual thing obviously that's not how I was looking at brainwashing. But would it be more correct to term it programming?

A Yes. . . . A programming of behavioral--the lack of appropriate choices due to role models and a programming in a way of thinking and being." (150a).

On cross-examination, Mr. Hammond discussed the issue of coercion with Ms. Jalovaara and got the following response: ". . . It becomes coercion if it's something that's not in the best interest of the child and the child is forced to do it, and the child

may not even know after a while there is a choice." (166a).

Following cross-examination, as well as examination by the Court, the prosecutor asked the following hypothetical question:

"Q Ma'am, when Mr. Hammond was asking you questions he asked if there was a universal agreement between behavioral scientists and clinicians regarding behavioral models of subjugation and you I think indicated, no, there was not. Ma'am, given the facts of the hypothetical situation we've been talking about here today, a girl approximately 12 years of age coming from a home without a father figure becomes involved with a family where the wife is one of her teachers or coach and the father is a police officer where she begins to babysit for the family and eventually the father, the police officer, begins to have sexual relations with her at age 12. Where that continues over a period of time when she's 12, when she's 13, when she's 14, when she's 15, often as often as--on a very regular basis, often as often as two or three times a week, sometimes less frequently. Where the man has indicated marriage as a possible eventual outcome and has given her gifts including a ring. Would--taking into consideration the fact that there are apparently various approaches to psychology and you can indicate what some of them are, I think social, behavioral, humanistic, transactional, developmental, perhaps others. Given these different approaches, do you believe that there would--given the facts of this hypothetical situation and the length of its duration, that there would be a consensus of opinion that in this particular case where the manipulation of the young girl began at age 12, etcetera, would there be a consensus of opinion that at age 16 she would not be subject to a free choice or would be subject to coercion?" (184a - 185a).

Following objection by counsel, Ms. Jalovaara re-worded the question as follows:

"A If the question is as I perceive it to be, a consensus of opinion no matter what the approach would be, the psychological, be it humanistic, be it behavioral, or social scientists, or EMDR, no matter what is it, that trained professionals looking at this hypothetical case would say that we would deem there would be a degree of coercion, manipulation, distortion so that this young person was not

able to make a choice?

Q Yes.

A The choice was taken from her?

Q Yes.

A Yes.

Q You can answer that question. And what would your answer be?

A A consensus of opinion to me does not mean it's universal. It means that the way we put the DSM-4 together is on consensus. At this point the information that we have is sufficient to say that this is what we deem a symptom, a category, a personality disorder, or whatever. My opinion on that would be that other psychologists no matter what their approach would look at this and say there certainly is an element of coercion, be it due to the direct--the direct ongoing physical contact of a developing child who cognitively and physiologically and emotionally now is fragile, depending upon surrogate parents. There's so much here to lose that even though there isn't a direct threat there, in this young person's eyes, isn't much of a choice. So therefore I would believe that the consensus opinion would be that this young person does not have a free choice." (187a - 188a).

Finally, the following exchange took place between defense counsel Hammond and Ms. Jalovaara as they discussed whether there would be a consensus vs. universal agreement:

"A No, a consensus doesn't mean universal. Okay. A consensus means--

Q The question I asked you--

A --that 9 out of 10 or 8 out of--okay. And I would believe that in most cases given the evidence that this has been an ongoing dur--it's ongoing duration, there is manipulation in terms of rings, promises, some type of reward for behavior,

that it has been sanctioned by someone on a power figure, somebody in the--who was deemed as very powerful in the community, out of the community, that the lack of her own biological family for structure, the lack of a father figure, it would appear that in the hypothetical situation such as this most of us psychological--psychologically astute people might or would say a consensus of opinion that there is not a choice, it's taken away.

Q All right. You're saying there's not a choice. You're not necessarily saying that there's coercion present?

A The coercion is--I think there's an element of coercion in this, yes.

Q All right. Based on your definition that any form of influence or reward could even be coercion?

A Yes." (189a - 190a).

On March 16, 2000, Judge Newcombe announced his decision. He indicated: "The testimony in this case was basically uncontroverted, particularly the testimony by the victim. **And the Court for purposes of the record finds her testimony as to the events that occurred to be entirely credible and believable.**" (Emphasis added). (192a). Furthermore, the Court said: "And the Court has little difficulty in determining that a theory of subjugation is in fact a proper theory. And if the testimony rises to the level of probable cause a defendant in a case could be bound over to Circuit Court for trial or further proceedings based on that theory." (193a).

Judge Newcombe then said:

"It is the People's theory of the case that the defendant subjugated the victim by the continual--a continual pattern of sexual relations over a long period of time, since the victim was approximately 12 years old to the specific act charged here on July 4th of 1993. The victim being born on July 12th of 1976, making her just a few days short of her 17th birthday at the time of the offense charged here. And is obvious on the record prior contacts were not charged

because of the statute of limitations and the time period involved.

The People appear to rely on three areas of contact between the victim and the defendant in establishing their theory of subjugation. First, that the defendant was a police officer; second, that at least at one point in time he was an assistant coach on a team that the victim was playing for; and third and primarily, that he was in fact a father figure or a figure of authority to the victim. Although it is true the defendant is and was a police officer during the entirety of these acts, there has been no indication shown to the Court that at the time of the offense in 1993 that the defendant was in any way acting through any pressure or belief that if she failed to give sexual--perform sexual acts to the--on the defendant that he would somehow act in his capacity as a police officer or that she was in any way intimidated or threatened by the status of his being a police officer at that time. Also as to the assistant coach, for want of a better word, role of the defendant, this was tenuous at best and I believe was maybe one or two isolated occurrences. And there certainly is no showing again that by 1993 if in fact the defendant was acting in that capacity that this in any way affected the mental state of the victim or to cause her to come under any kind of pressure or authority or a subjugation theory.

The principal part of the People's case is that the victim was solicited at an early, tender age of approximately 12 years old while she was certainly vulnerable to such attention, became engaged in the sexual relationship over a long period of time rendering her subjugated to the defendant's request for sexual favors to the extent that she did not have the ability to refuse them.

There is absolutely no question in the Court's mind that had the defendant been charged with an occurrence occurring several years earlier other than the statute of limitations difficulty that probable cause would clearly have been established under this theory. Now it certainly isn't anybody's fault that because of the statute of limitations this was not able to occur. But the question the Court must address is the state of the mind and the status of the parties at the time of the offense in context with the earlier acts.

The Court is simply not convinced that the People have established probable cause to believe that the offense charged has been committed in this regard. Although certainly the victim had a relationship with the defendant as of the date of the offense, the Court notes several factors that it considered in its opinion. First of all, this was the last sexual encounter with the defendant; the age

of the victim; the victim and the defendant were not living together or seeing each other on a regular basis as they had been; the victim was at home living with her mother at the time. The meeting on the date of offense was entirely voluntary on the victim's part; the parties having been separated for some period of time, somebody was on a vacation. I don't really recall who. The victim had on at least one prior occasion had tried to break off the relationship with the defendant but in the opinion of the Court one of the reasons why she continued the relation was she was in fact hoping that the defendant might leave his wife and marry her.

Extensive testimony was presented by the prosecutor by--for the prosecutor by Rosemary Jalovaara, - I hope I'm pronouncing that correctly - a psychologist, who testified and compared the facts in this case with other profiles involving victims of criminal sexual conduct. The Court notes that the witness never interviewed or treated the victim in this matter. There has been no testimony that the witness had an opportunity to examine any medical or psychological history or records of the victim. And thirdly, that the testimony that the witness gave as to her profiling did not rise to the level of a syndrome, which in the opinion of the Court certainly would be helpful here.

A syndrome, of course, the Court explained in People v Wilson, 194 Mich App 599, sets forth the qualifications for testifying in that regard. And of course I don't think there was any pretense on behalf of the prosecutor or the victim that the area here had reached the level of a syndrome.

The People cite cases in support of their opinion in this matter, People v R-e-g-t-s, 219 Mich App 294. In this case the primary issue was whether or not the acts of a clinical psychologist constituted mental treatment under the terms of the statute. Although, the People cited a portion of that case citing in turn People v Premo, 213 Mich App 406, in which that Court quoted Black's Law Dictionary stating that coercion, "may be actual, direct, or positive, as where physical force is used to compel acts against one's will, or implied, legal or constructive as where one party is constrained by subjugation to other to do what his or her free will would refuse." Although, the Court certainly accepts that definition of subjugation, the burden of course is on the prosecutor to show that the probable cause that the acts complained of here constituted subjugation within that definition. And the Court is not convinced that level of testimony has been presented.

The Premo case itself involved a charge of fourth degree criminal sexual conduct where a teacher pinched the buttocks of three female students while they were on the premises of the school. The Court is aware that the terms of MCL 750.520 clearly states: "Force or coercion includes, but is not limited to any of the following..." And, therefore, the specific acts complained of do not have to be enumerated in the statute, however they do have to be acts sufficient to establish force or coercion as defined.

Again, the Court is simply not able to determine that the People have shown probable cause that the victim's free will was so overcome by the past acts of the defendant or their relationship that she was unable to resist the invitation for sexual contact. The Court is therefore dismissing the charge contained in count 1 of the complaint.

Insofar as the count 2 is concerned, the felony firearm charge accompanying count 1, the Court is dismissing that matter due to count 1 being dismissed." (193a - 198a).

ARGUMENT

ISSUE 1

WAS THE COURT OF APPEALS IN ERROR IN FINDING THAT THE MAGISTRATE HAD ABUSED HIS DISCRETION IN FAILING TO BIND DEFENDANT OVER TO STAND TRIAL ON THE CHARGE OF 1ST DEGREE CRIMINAL SEXUAL CONDUCT WHERE THE TESTIMONY TAKEN AT PRELIMINARY EXAMINATION ESTABLISHED THAT AT THE AGE OF 12 THE VICTIM BECAME INVOLVED WITH DEFENDANT, A DEPUTY SHERIFF, AND DEFENDANT'S WIFE, A SCHOOL TEACHER AND BASKETBALL COACH; WHERE THE RELATIONSHIP STARTED AT SCHOOL, EVENTUALLY INVOLVED THE VICTIM ACTING AS A BABYSITTER IN DEFENDANT'S HOME; WHERE THE RELATIONSHIP FURTHER EVOLVED TO WHERE THE VICTIM CONSIDERED HERSELF A PART OF DEFENDANT'S FAMILY AND WAS SPENDING NIGHTS AT DEFENDANT'S HOME AT TIMES WHEN SHE WAS BABYSITTING AND AT TIMES WHEN SHE WAS NOT BABYSITTING; WHERE THE VICTIM, A CHILD WHO HAD BEEN ADOPTED AT AGE 4, AND THEN ABANDONED BY HER ADOPTIVE FATHER AT AGE 9, BEGAN TO LOOK AT DEFENDANT AS THE FATHER FIGURE SHE DID NOT HAVE; WHERE DEFENDANT SLOWLY BEGAN TO COMMIT SEXUAL CONTACT WITH THE 12 YEAR OLD VICTIM, AT FIRST BY PATTING HER ON THE REAR END AFTER A GOOD BASKETBALL GAME AND COMPLIMENTING HER PERFORMANCE AND THEN EVENTUALLY PROCEEDING FURTHER TO INCIDENTS INVOLVING SEXUAL PENETRATION, INCLUDING ACTS OF SEXUAL INTERCOURSE AND ACTS OF FELLATIO; WHERE THESE SEXUAL ENCOUNTERS EVENTUALLY OCCURRED AT LEAST A COUPLE OF TIME A WEEK, BEGINNING AT AGE 12 AND ENDING AT AGE 18; WHERE THESE ACTS OCCURRED IN DEFENDANT'S HOME, AT TIMES WHEN HIS WIFE AND CHILDREN WERE PRESENT IN THE HOME, AT DEFENDANT'S FAMILY COTTAGE, AGAIN WHEN HIS WIFE AND CHILDREN WERE PRESENT AT THE COTTAGE, IN DEFENDANT'S PERSONAL VEHICLES, IN MARKED AND UNMARKED POLICE VEHICLES, AT A SHOOTING RANGE AND AT THE VICTIM'S BOARDING SCHOOL; WHERE THERE IS TESTIMONY FROM AN EXPERT WITNESS, A PSYCHOLOGIST, THAT UNDER THESE CIRCUMSTANCES THE ACTIVITIES WOULD AMOUNT TO A PROGRAMMING IN A WAY OF THINKING AND BEING, AND THAT IT WOULD BE THE CONSENSUS OF OPINION AMONG PSYCHOLOGISTS, NO MATTER WHAT THEIR APPROACH TO PSYCHOLOGY, THAT A YOUNG PERSON WOULD NO LONGER HAVE A FREE CHOICE IN DECIDING WHETHER OR NOT TO ENGAGE IN SEXUAL ACTS ; WHERE THE EXAMINING MAGISTRATE FOUND THE VICTIM'S TESTIMONY TO BE ENTIRELY CREDIBLE AND BELIEVABLE, BUT WAS FACTUALLY IN ERROR IN UTILIZING AS A RELEVANT FACTOR THAT THE INCIDENT CHARGED ON JULY 4, 1993, WAS THE LAST SEXUAL ENCOUNTER WITH DEFENDANT, THE EVIDENCE ESTABLISHING INSTEAD THAT THE SEXUAL RELATIONSHIP CONTINUED FOR ANOTHER 1 ½ YEARS; WHERE THE

EXAMINING MAGISTRATE INCORRECTLY VIEWED THE FACT THAT DEFENDANT WAS A POLICE OFFICER FROM THE STANDPOINT OF THE IMPACT IT HAD ON THE DATE OF OFFENSE WHEN THE VICTIM WAS 16 YEARS OLD AS OPPOSED TO VIEWING THE FACT THAT DEFENDANT WAS A POLICE OFFICER AS ONE ASPECT OF THE CONTINUUM OF EVENTS OVER A 4 TO 5 YEAR PERIOD OF TIME DURING THE VICTIM'S FORMATIVE YEARS OF SEXUAL DEVELOPMENT THAT COMBINED THE FACT THAT DEFENDANT WAS A POLICE OFFICER, WITH THE FACT THAT HE WAS A FATHER FIGURE, WITH THE FACT THAT FOR ALL INTENTS AND PURPOSES DEFENDANT LED THE VICTIM TO BELIEVE THAT SHE WAS A PART OF HIS FAMILY, WITH THE FACT THAT DEFENDANT AND HIS WIFE AS POLICE OFFICER AND SCHOOL TEACHER HELD HIGHLY RESPECTED POSITIONS IN THE COMMUNITY, INCLUDING THE FACT THAT DEFENDANT WAS A "D.A.R.E.", OFFICER, COUPLED WITH THE FACT THAT DEFENDANT AND HIS WIFE REGULARLY ATTENDED CHURCH, PICKING THE VICTIM UP SO THAT SHE COULD ATTEND CHURCH WITH THEM EVERY SUNDAY, WERE ALL COMING TOGETHER TO SHOW THAT DEFENDANT IN EFFECT PROGRAMMED THE VICTIM TO NOT QUESTION THEIR SEXUAL ENCOUNTERS AND TO INSTEAD CONSIDER THEM TO BE A NORMAL PART OF WHAT THEY WERE TO DO WHEN THEY WERE TOGETHER, AND TO THUS TAKE AWAY HER FREE WILL AND SUBJUGATE HER INTO BECOMING A "SEX SLAVE"?

THE STANDARD OF REVIEW IN EXAMINING A MAGISTRATE'S BIND OVER DECISION IS AN ABUSE OF DISCRETION STANDARD. PEOPLE v GOECKE, 457 Mich 442, 462; 579 NW2d 868 (1998). HOWEVER, A REVIEWING COURT USES A CLEARLY ERRONEOUS STANDARD IN DEALING WITH FINDINGS OF FACT. PEOPLE v HERMIZ, 235 MICH APP 248, 255; 597 NW2d 218 (1999), *AFFIRMED*, 462 MICH 71; 611 NW2d 783 (2000); 602 NW2d 582 (1999). PEOPLE v GISTOVER, 189 MICH APP 44, 46; 472 NW2d 27 (1991).

Plaintiff-appellee believes that the District Court Judge erred in failing to bind Defendant-appellant over for trial on Counts 1 and 2, in part because the Judge applied incorrect facts in reaching his decision.

The Court early in it's decision determined the testimony of the victim to be "entirely credible and believable." (Emphasis added). (192a). Yet, in discussing why it felt that the People had not established probable cause, the Court stated: "First of all, this was the last sexual encounter with the defendant; the age of the victim; the

victim and the defendant were not living together or seeing each other on a regular basis as they had been; the victim was at home living with her mother at the time. . . .” (195a). However, it is clear from the testimony of the victim, Nicole Fisher, that this was not the last sexual encounter with the defendant. In fact the relationship went on for another 1 ½ years after the charged incident occurred.

The charged incident occurred during the summer between Nicole’s junior and senior years in high school. (55a). The relationship continued until the middle of Nicole’s freshman year in college:

“Q Can you relate for the record the point in time when it ended?

A It ended I believe it was either the end of February or beginning of March.

Q Of what year please?

A It was my freshman year of college, so it would’ve been 1995.

Q And you were 18 years of age.

A Uh-huh.” (95a).

Furthermore, while the Court was correct factually in stating that Nicole and defendant were not “seeing each other on a regular basis as they had been,” this was only because Nicole had been away in Mexico for a month on a student study program sponsored by Michigan Lutheran Seminary. (55a). Yet, even while she was gone, defendant telephoned her on two occasions. On the second of this phone calls defendant told Nicole: “. . . he had something very special for me. And that I should look underneath the bench on my mother’s front porch as soon as I got home. And I

looked under that bench when I got home and there was a promise ring there. And then when I got home I talked to Mr. Perkins on the telephone and he was on duty. And we agreed to meet at the Industrial Park on my way into church that Sunday. And we met there.” (55a). It was during this meeting that the charged offense occurred.

Yet while the District Judge placed an emphasis in his ruling that this was the last sexual occurrence, it is clear from the testimony that it was not. In addition to the colloquy with defense counsel quoted above, there are other references to the fact that the sexual relationship occurred on a regular and continuing basis throughout Nicole’s time in high school:

“Q How did--how is it that you often went places with him alone?

A . . . When I attended school at Michigan Lutheran Seminary I was involved in sports. I played basketball. I ran track. He would come to my basketball games. And instead of riding home on the bus with the team he would bring me home back to the dorm. And we would be alone then. And sexual activities happened on countless occasions that way. . . .

Q And when these- -when you were playing basketball and he would come to the games and then take you back to MLS, have sex on the way back, how old were you when that was going on?

A It started when I was a freshman and kept going till I was a senior.

Q So how old were you when you were a freshman?

A When I was a freshman I was 14, 13, 14.

Q And how old were you when you graduated from MLS?

A I was 17.

Q How often would this occur in terms of basketball games,

this picking you up?

A He came to most of my games.

Q How many years did you play basketball?

A I played basketball all four years.

Q And he came to most of the games over that four year period of time?

A Yes.

Q And when he would come to the game, did he drive you back to MLS every time?

A No, not every time.

Q Approximately what percentage of the time would you say he drove you back? If you know.

A That's hard to answer.

Q Okay. Was it a common occurrence?

A Yes." (42a - 43a).

Still another place in the testimony where it is clear that the sexual relationship continued well past the charged incident can be seen in the following testimony:

"Q Okay. Was there something else that he had an official role with?

A Mr. Perkins and I took statistics for the football team my junior and senior years.

Q So what would that entail?

A Mr. Perkins and I took statistics for the football team and turned the statistics in to the coaches at the end of the night. And often times Mr. Perkins would take me home from the games. And I would say that every occurrence that he took me home from the game we had sex.

Q Was that the same with the basketball games when he'd take you home there would be sex every time?

A When he would take me home, yes.

Q When he would take you home.

A Please understand that sex was just something that was automatic. It's like when we were together and we were alone it was something that happened.

Q Beginning when?

A As far back as I can remember." (44a).

Another indication that the sexual relationship continued after the charged incident can be found from the fact that what slowed down was the number of occasions when the sexual acts occurred in defendant's home, and that slowdown was occasioned by the move of Nicole's mother to Saginaw.

"Q Ma'am, we've talked about the shooting range, we've talked about the family cabin, we talked about one instance of sexual intercourse took place in Mr. Perkins home, were there other instances that took place in his home?

A There were countless occasions that it took place in his home.

Q And when you say countless occasions, beginning when you were 12 years old and going on until when?

A Probably 17. The older I got—er, after my mother had moved to Saginaw I would say it didn't happen as frequently in his home. Specifically in his home.

Q When did you mother move to Saginaw?

A She moved to Saginaw the summer before my senior year of high school.

Q And do you recall what that— when your senior year was?

A My senior was the year '93, I graduated in '94. So it would've been the summer of '93." (39a).

Along these same lines, the sexual activity occurred after Nicole's mother moved to Saginaw, which was after the charged offense:

"Q You said that you and Mr. Perkins had sex in your mom's home?

A Yes.

Q Can you tell us how that would occur?

A I can remember when we lived on Eric James Court in Saginaw and he would come and we would have sex downstairs in the living room.

Q Why in the living room?

A We would have sex in the living room because Mr. Perkins did not want to take me upstairs for fear that somebody could come home and it would be easy to be caught. And we'd have sex in the living room because there were sheer curtains in there and you could see and you could hear if someone were approaching, coming home." (45a).

The reason why this factual inaccuracy in the District Judge's ruling is important, is because the People's theory is that Nicole Fisher was the victim of subjugation, which is a form of coercion. Obviously, if this was the last sexual encounter with the defendant it would make the theory of subjugation less plausible. After all, if she could end it right after this incident, surely she could have said "no". However, when one considers the fact that things went on as they had for the past 4+ years for another 1 ½ years, then a mistake as to the facts becomes a crucial error in the analysis of whether the People have shown probable cause.

As the Court of Appeals said in People v Premo, 213 Mich App 406, 410-411;

540 NW2d 715 (1995):

“However, the Legislature did not limit the definition of force or coercion to the enumerated examples in the statute. MCL 750.520e(a)(a); MSA 28.788(5)(1)(a). Furthermore, the existence of force or coercion is to be determined in light of all the circumstances and is not limited to acts of physical violence. People v Malkowski, 198 Mich App 610, 613; 499 NW2d 450 (1993). Coercion

may be actual, direct, or positive, as where physical force is used to compel act against one’s will, or implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse. [Black’s Law Dictionary (5th ed), 234.]”

Also of note is People v Regts, 219 Mich App 294; 555 NW2d 896 (1996):

“We first consider whether there was sufficient evidence presented at the preliminary examination to conclude that defendant accomplished the charged acts of sexual contact and penetration by use of coercion. We conclude that there was. In *People v Premo*, 213 Mich App 406, 410-411; 540 NW2d 715 (1995), this Court, quoting Black’s Law Dictionary (5th ed), p 234, stated that coercion “may be actual, direct, or positive, as where physical force is used to compel act against one’s will, or implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse.

In the case at bar, defendant, as the victim’s psychotherapist, manipulated therapy sessions to establish a relationship that would permit his sexual advances to be accepted without protest. That is, he subjugated the victim into submitting to his sexual advances against her free will. Accordingly, the circuit court properly reinstated charges with respect to all “coercion” theories.” Emphasis added. *Regts, supra*, 295-296.

In this case the victim, Nicole Fisher was taught by her “father figure”, the person who had brought her into his family, an authority figure as both a “father” and a police officer, that it was normal and natural to have sex with him. Someone in his position surely would not have started the course of conduct that began when she was 12 years

old if it was not alright - - if it was not how families behaved. He taught her that having sex was just a normal, natural part of their relationship. In effect, he made Nicole his "sex slave", and she was thus "constrained by subjugation" to do as she had been taught. Her performance of fellatio upon Mark Perkins on July 4, 1993 was therefore not the product of a free choice, but was the end result of years of behavior training.

In the case at bar defendant is Nicole's father figure as well as a police officer. His family became her family. Beginning at age 12, defendant manipulated Nicole (as did the psychotherapist in Regts, supra) so as "to establish a relationship that (Nicole) would permit his sexual advances without protest. That is, he subjugated the victim into submitting to his sexual advances against her free will", and thus accomplished sexual penetration through the use of coercion.

As to the personal injury aspect of the charge, Nicole's testimony makes it clear that she suffered serious mental anguish as a result of defendant's acts.

Furthermore, in addition to being factually incorrect in relying on the conclusion that the charged offense was the last sexual encounter, the District Court Judge appears to have totally ignored the testimony of the People's expert psychologist, Rosemary Jalovaara. Again, perhaps this would not be error if the charged sexual encounter was the last one to have occurred, but where the relationship was part of a continuum that started approximately 4 years prior to the charged incident on July 4, 1993, and continued unabated for another 1 ½ years, to totally ignore the psychological testimony is, in the People's opinion, an abuse of discretion.

The Court characterizes Ms. Jalovaara's testimony as comparing "the facts in this case with other profiles involving victims of criminal sexual conduct." (196a) The

Court seems to have chosen to ignore Ms. Jalovaara's testimony because: "the witness never interviewed or treated the victim in this matter. There has been no testimony that the witness had an opportunity to examine any medical or psychological history or records of the victim. And thirdly, that the testimony the witness gave as to her profiling did not rise to the level of a syndrome, which in the opinion of the Court certainly would have been helpful here." (196a).

While the Court chose to characterize Ms. Jalovaara's testimony as comparing the victim with the profiles involving other victims of criminal sexual conduct, the People disagree with that characterization. What Ms. Jalovaara did do was testify as to the psycho-sexual development of children beginning at about age seven or eight and extending on to adulthood. She was also asked questions about what can be expected to occur when a child is in a situation such as Nicole's is taken in and befriended by an adult father figure/police officer and his family at an early age and is then victimized sexually by that person.

Ms. Jalovaara's testimony is summarized earlier in this brief under the heading "Counter-Statement of Facts", and it will not be repeated here. (See pages 19 - 29 of this brief.) Suffice it to reiterate that when asked whether she felt that there would be a consensus of opinion in the psychological community, regardless of the psychological approach taken, that a person in a similar circumstance to Nicole Fisher would not be able to make a free choice as to whether or not to engage in sexual relations, her testimony was: "So therefore I would believe the consensus opinion would be that this young person does not have a free choice." (188a).

On cross examination, after questioning whether Ms. Jalovaara felt that there would be a consensus vs. universal agreement, defense counsel asked:

“Q All right. You’re saying there’s not a choice. You’re not necessarily saying that there’s coercion present?”

A The coercion is – I think there’s an element of coercion in this, yes.” (190a).

The People believe that the District Judge abused his discretion in apparently ignoring this psychological testimony from Ms. Jalovaara. While we believe that it only common sense to realize that when a child is taught from an early impressionable age by a person who is in a respected position (a police officer and a father figure) that certain conduct is normal and appropriate, and where that person leads the child to believe that if she only goes along with his desires that it will eventually lead to a lifelong commitment (marriage), that the learned conduct is not the free choice of the victim, certainly the psychological testimony deserves some consideration.

Ms. Jalovaara’s explanation of the psycho-sexual developmental process simply confirms from a psychological standpoint what the People believe is just plain common sense. The Court should not have totally ignored her testimony.

Of course, if the District Judge had not been mistaken factually regarding the fact that the sexual relationship between the defendant and the victim continued for another 1 ½ years past this incident, perhaps the Judge would not have dismissed the psychological testimony!

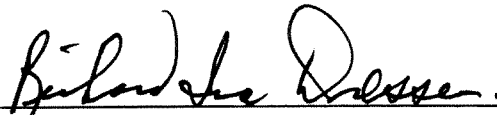
Under the circumstances of this case, the findings of fact that the magistrate applied in making his decision were clearly erroneous. As a result he refused to bind the defendant over to Circuit Court to stand trial on the charge of 1st degree criminal

sexual conduct despite the overwhelming evidence of coercion in the form of subjugation, and his refusal was an abuse of discretion.

RELIEF REQUESTED

Plaintiff-Appellee requests that this Honorable Court affirm that portion of the decision of the Court of Appeals in which that court concluded that there was sufficient evidence presented at the preliminary examination to establish probable cause to believe that the crime of 1st degree criminal sexual conduct had been committed and probable cause to believe that defendant committed that offense, and that the examining magistrate thus abused his discretion in failing to bind defendant over on the charge of CSC 1st.

Dated: August 22, 2002



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